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No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Respondents do not take issue with the principal contentions made in the Petition. They admit that the Ninth Circuit's decision in this case directly conflicts with the Fifth Circuit's holdings: (1) that IOLTA ("Interest on Lawyers' Trust Accounts") programs violate the Fifth Amendment by confiscating private property without providing appropriate compensation; and (2) that plaintiffs challenging IOLTA programs are entitled to declaratory and injunctive relief to remedy that violation. They agree with Petitioners that the issues raised by the Petition are of significant public importance, particularly given that all 50 States and the District of Columbia operate IOLTA programs and that the fate of all such programs depends on how the split between the Fifth and Ninth Circuits is resolved. They do not dispute that the issues over which the circuits disagree are the very issues that the Court directed be addressed on remand in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), in which the Court held that interest income earned on IOLTA accounts is the private property of those whose funds generated the income.

Because they cannot avoid making these concessions, Respondents are largely reduced to criticizing the Fifth Circuit's decision, issued more than seven months ago. But such criticism does not make the inter-circuit conflict go away. Moreover, the pendency of a motion for rehearing *en banc* in the Fifth Circuit case is not a proper basis for denial of the Petition. The constitutionality of legal services funding programs in all 50 States is too important an issue to render appropriate any further delay in its resolution. Ever since *Phillips*, the constitutionality of IOLTA programs has been open to serious question. *Phillips* has spawned new Fifth Amendment challenges to IOLTA programs, and others

are likely to follow. *See* Brief of *amici curiae* Citizens for the Preservation of Constitutional Rights, *et al.* (describing pending constitutional challenge to Massachusetts IOLTA program). Given that IOLTA programs generate revenues in excess of $100 million dollars each year, the need for early resolution of the issues raised by *Phillips* cannot be overestimated.[1]

Respondents also assert that this case is a poor vehicle for resolving the questions presented and/or that review is premature. *See* LFofW Br. 8-9; Brief of Justices of the Washington Supreme Court ("Justices Br.") 9. Those assertions are not well taken. Petitioners' Takings Clause claims are as well-developed as they will ever be: the Ninth Circuit affirmed the final dismissal of all such claims. While Petitioners' First Amendment claims are still open on remand to the district court, it is the Fifth Amendment issues that were the focus of *Phillips*, and it is the Fifth Amendment issues -- not the First Amendment issues -- over which the Fifth and Ninth Circuits are in conflict.

Moreover, this case in many ways is a better vehicle than the Fifth Circuit case for addressing the Takings Clause issues. Because the Fifth Circuit held that the Texas IOLTA program amounted to a *per se* violation of the Takings Clause, it had no occasion to analyze the program under the *ad hoc* approach outlined in *Penn Central Transportation Co.*

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[1] Alternatively, if the Court attaches significance to the pendency of a rehearing petition in the Fifth Circuit, Petitioners agree with Respondents Legal Foundation of Washington and Frank (hereinafter "LFofW") that the Court may wish to defer consideration of this Petition until the Fifth Circuit rules on the rehearing petition. LFofW Br. 20 n.11.

v. City of New York, 438 U.S. 104 (1978). *See Washington Legal Found. v. Texas Equal Access to Justice Found.* [hereinafter, "*TEAJF*"], 270 F.3d 180 (5th Cir. 2001). In contrast, the court below considered both whether the Washington State IOLTA program should be analyzed under the *per se* takings approach outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and whether the program could survive scrutiny under the *ad hoc* approach. Pet. App. 27a-32a and 33a-38a. This Court would have the benefit of both analyses if it decides to grant review in this case.

I. The Court Should Grant Review To Resolve the Conflict in the Circuits Over the Constitutionality of IOLTA Programs

Respondents devote much of their opposition briefs to an attack on the Fifth Circuit's decision as inconsistent with this Court's precedents. But as the Petition explained, it is the Ninth Circuit that has been unfaithful to those precedents.

The opposition briefs of LFofW and the Justices are desperate attempts to deny the obvious. In *Phillips*, this Court said:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. . . . While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. . . . The government may not seize rents received by the owner of a building simply because it can prove that

> the costs incurred in collecting the rents exceed the amount collected.

Phillips, 524 U.S. at 170-171. That, of course, is this case. To be sure, the Court in *Phillips* did not decide the takings issue, but that was because the courts below had not. The principle is unmistakably clear.

Phillips establishes that the interest in these IOLTA accounts is the property of the plaintiff Petitioners. There can be no arguing with that. Second, there can be no arguing that at the end of the day Respondent LFofW had that money in its pocket -- to the tune, it tells us, of $3-$4 million each year. Well, how did it get it? In plain English, they took it.

Respondents make heavy weather of the distinction between *per se* and regulatory takings, as if somehow this helps them escape the obvious conclusion that the government has taken but not paid for something that does not belong to them. In requiring compensation in all such situations, the Court has never noted a distinction between the confiscation of real property and the confiscation of personal property. The Court just last month in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 70 U.S.L.W. 4260, 4265 (2002), explained:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation

> proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. . . .
>
> In a footnote, the Court clarified:
>
> In determining whether government action affecting property is an unconstitutional deprivation of ownership under the Just Compensation Clause, a court must interpret the word, "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

Id. at 4265 n.17.

Given the character of the program at issue here, Respondents' suggestion that the IOLTA scheme constitutes a regulation of the interest is utterly unhelpful to them. While Petitioners submit that outright takings of money, like this one, fit easily within the category of *per se* takings, at the end of the day, it should make no difference whether the taking is analyzed under the *per se* or the *Penn Central* test. There is only one Takings Clause. Its core purpose is to foreclose just the sort of random, drive-by seizures of private assets for general governmental purposes as are perpetrated by the Washington IOLTA program. In view of what is at issue, the IOLTA program represents an obvious taking,

whether one evaluates it under a *per se* test, or under the more circuitous, three-factor analysis of the *Penn Central* decision.

Equally convoluted and in the end unavailing is the argument that even if the government did take millions of dollars of interest that belongs to Petitioners and others like them, there can be no relief because perhaps -- and this fact was disputed on summary judgment -- the property had no financial value to them.[2] Putting aside that this argument contradicts the passage from *Phillips* quoted above, it ignores the fact that the money confiscated from Petitioners had an easily ascertainable, positive value. The Fifth Circuit understood this. The Ninth did not.[3]

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[2] LFofW argues that Petitioners "did not even offer evidence that their funds were deposited at a bank that ceased paying earnings credits to their escrow companies." LFofW Br. 7. That is wrong. The record is undisputed, for example, that the bank into which Petitioner Greg Hayes's funds were deposited ceased paying earnings credits after the IOLTA program was expanded to cover real estate professionals and before Mr. Hayes's funds were deposited. *See* Excerpts of Record 6 (Affidavit of Sharon S. Brinley) at 3.

[3] Respondent LFofW attempts to avoid discussion of the "just compensation" issue by asserting that the Petition does not challenge the Ninth Circuit's holding that Petitioners suffered no loss and thus are not entitled to compensation. LFofW Br. 9, 17. That assertion is demonstrably wrong; two sections of the Petition directly challenge the Ninth Circuit's "no compensable loss" holding. Pet. 18, 22. The first Question Presented explicitly raises the question whether the IOLTA program violates Petitioners' rights under the Takings Clause in such manner "that the property owners are entitled to relief."

Finally, the Justices seek to paint the IOLTA program as a regulatory regime that was expanded to the real estate industry to protect depositors from self-dealing escrow and title companies. Justices Br. 6. There is nothing in the record to support this *post hoc* assertion that the State was "protecting" depositors by confiscating their funds. Indeed, the Washington State Department of Licensing (which regulates escrow companies in the State) has long been aware of, and approves of, the "earnings credits" system that the Justices suddenly found objectionable after this suit was filed.

II. The Court Should Grant Certiorari To Determine the Availability of Equitable Remedies for Takings That Result from the Outright Confiscation of Money

Respondents do not dispute that the Fifth Circuit held -- under facts virtually identically to the facts of this case -- that those challenging IOLTA programs on Takings Clause grounds may seek injunctive and declaratory relief to remedy the constitutional violation. *See, e.g.*, LFofW Br. 10.

Yet, despite the Ninth Circuit's holding that Petitioners are not entitled to equitable relief, Respondents insist that "there is no split in the circuits as to the availability of injunctive relief." LFofW Br. 10. They base that assertion on their claim that the appeals court "only touched on" the question of equitable relief in connection with its ruling that several of the Petitioners lacked standing. *Id.*

Respondents' linguistic contortions are insufficient to overcome the fact that although the Ninth Circuit may have "only touched on" the equitable relief issue, its ruling on that

issue was the "but for" cause of its dismissal of several Petitioners' claims. The sole remedy sought by the Washington Legal Foundation (WLF) in this action is equitable relief on behalf of members whose constitutional rights are threatened by the IOLTA program. The Ninth Circuit held, *sua sponte,* that WLF lacked standing to assert its members' constitutional rights for the *sole* reason that "prospective injunctive relief is an inappropriate remedy here, where the individuals are pursuing their remedy against the state, and the question is whether they are entitled to any remedy for the state regulatory action at issue." Pet. App. 18a.

Similarly, the claims of Petitioner Dennis Daugs would not have been dismissed for lack of standing "but for" the appeals court's finding that he was not entitled to seek equitable relief, the sole form of relief he sought. Respondent LFofW contends that the Ninth Circuit held that Mr. Daugs lacked standing because he has "no cognizable property interests" in the funds he holds for his clients. LFofW Br. 22 n.14. That is not correct. The Ninth Circuit "assum[ed], without deciding," that Mr. Daugs does indeed possess "legal title" to funds held in his escrow account. The appeals court nonetheless held that Mr. Daugs lacks standing because he cannot assert a monetary claim to recover for himself the interest income confiscated by LFofW and because such monetary relief is the only relief available in a Takings Clause case of this type. Pet. App. 13a-14a.

Respondents also assert the absence of a circuit split over the equitable relief issue because the Fifth Circuit ruled as it did only after holding that Texas had waived its objections to injunctive relief. LFofW Br. 10. That is a

mischaracterization of the Fifth Circuit's holding. The Fifth Circuit did indicate that Texas, in prior proceedings, had conceded that it was "subject to" injunctive relief. *TEAJF*, 270 F.3d at 190. But the court did not rest its holding on that concession alone. Rather, it analyzed relevant case law at length and ultimately concluded that the challengers to the Texas IOLTA program were entitled to entry of injunctive and declaratory relief for violation of their Fifth Amendment rights. *Id.* at 190-194. That conclusion is directly contrary to the Ninth Circuit's holding that injunctive relief is unavailable in IOLTA cases, a holding that was the court's sole basis for its *sua sponte* dismissal of several Petitioners for lack of standing.

Respondents also challenge the Fifth Circuit's holding as contrary to this Court's case law. LFofW seeks to distinguish case law relied on by Petitioners on the ground that all of those cases involved claims filed against the federal government. LFofW Br. 22-25. LFofW asserts that a different analysis is required here because of alleged federalism concerns that arise when Takings Clause claimants seek injunctive relief in federal court and the defendant is a "State [that], as here, has waived its sovereign immunity to suits for inverse condemnation in its courts." *Id.* at 23. But that assertion assumes the existence of a non-futile state-law cause of action. In fact, the Ninth Circuit ruled (in the course of rejecting Respondents' claims that the case was not ripe for review) that no such non-futile action was available to Petitioners in state court, Pet. App. 21a, and Respondents have not sought review of that ruling.

LFofW also asserts that injunctive relief cases involving federal defendants are distinguishable because the Court

found that Congress did not intend, once a Takings Clause violation has been established, to permit the uncompensated takings to continue and then to relegate the plaintiff to repeated suits for damages under the Tucker Act. LFofW Br. 22 n.15 (citing *Eastern Enterprises v. Apfel,* 524 U.S. 498, 521 (1998)). But the Court did not base its ruling on any statutory language suggesting that Congress had "withdraw[n] Tucker Act jurisdiction over monetary claims arising under the Coal Act." LfofW Br. 22 n.15. Rather, the Court permitted the petitioner to seek injunctive relief against an alleged federal government Takings Clause violation involving a "direct transfer of funds," because it simply did not believe that Congress would have intended to require "an utterly pointless set of activities": repeated government appropriations of private funds followed by repeated claims for compensation by the owners of those funds. *Eastern Enterprises,* 524 U.S. at 521. The Court reached the same result in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 165-66 (1980), in which it granted declaratory relief against a Florida statute that mandated the confiscation of interest income earned on private funds.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] The Justices' brief indicates that their thought processes are similar to those *Eastern Enterprises* ascribed to Congress. The brief indicates that should a judgment be entered that included a finding of a Takings Clause violation, they would discontinue the IOLTA program. Justices Br. 20-21.

Respectfully submitted,

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